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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Respondent.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary,

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,200 members who represent nearly 2,800 of the leading businesses in the United States, Canada, and Europe.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

This case revolves around the deference granted classification rulings issued by the Customs Service. But it is not merely a Customs case. It is a case involving fundamental questions of administrative law. In reviewing interpretative rulings by a federal agency—such as the Customs Service—how much should a court defer to the agency's interpretation of the law? In its decision below, the United States Court of Appeals for the Federal Circuit held that classification rulings are not entitled to deference under the Supreme Court's seminal decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In reaching that decision, the Federal Circuit reasoned by analogy to revenue rulings issued by the Internal Revenue Service (IRS), noting that such "interpretive rulings . . . do not have the force and effect of regulations." The parallels between Customs rulings and IRS rulings, neither of which is subject to the notice-and-comment process, convinced the circuit court that Customs rulings "do not require *Chevron* deference."

This case is manifestly important to companies that import goods into the United States. It has broader ramifications, however, for other agency interpretations, including those by the IRS. As the individuals who must contend daily with the interpretation and administration of the nation's tax laws,

TEI's members have a vital interest in the deference to be accorded IRS interpretative rules by the courts. The decision will affect the balance between the orderly and reasonable administration of a statute and potentially unchecked and even arbitrary agency power. Many TEI members have first-hand knowledge that an agency may seek to bolster its litigating position by issuing rulings, *even after a case has been docketed in the courts*. Meaningful, albeit measured, judicial review of agency interpretative rulings is critical in safeguarding the public from unreasonable agency actions. Because TEI members and the businesses by which they are employed will be materially affected by the Court's decision in this case, the Institute has a special interest in the outcome.

SUMMARY OF ARGUMENT

1. This case involves a fundamental question of administrative law. In reviewing interpretative rulings by a federal agency, how much should a court defer to the agency's interpretation of the law? In its decision below, the United States Court of Appeals for the Federal Circuit held that Customs classification rulings are not entitled to deference under the Supreme Court's seminal decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Federal Circuit's decision is correct.

The issue of the deference to be accorded an agency's interpretative ruling requires a careful balance and the answer properly depends on the extent of public involvement in the development of the agency rule. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). To be sure, administrative agencies develop expertise in the subject matters within their jurisdiction, but the public has an indispensable role to play in ensuring that an agency is well informed and its position does not overreach. Simply stated, without notice and comment, an agency's decision could become capricious. Without meaningful judicial review of interpretative rules,

agencies could arrogate to themselves the power to unreasonably interpret or apply the law. A careful balance must be struck, and the courts are properly wary of deferring too much to agency interpretative rulings. *Amicus* TEI submits that the Federal Circuit struck the proper balance here and that its decision on the deference to be granted to the Customs Service's classification ruling fully accords with this Court's decisions in *Chevron* and subsequent cases.

2. In *Chevron*, this Court established a two-step test for determining the deference to be afforded interpretative rules by the courts. First, the court must review the intent of Congress. If it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If Congress has not directly addressed the matter, however, the question becomes whether the agency's answer is based on a permissible construction of the statute. 467 U.S. at 842-83. If the regulatory scheme is a "reasonable accommodation of manifestly competing interests," the agency's interpretation is entitled to deference. *Id.* at 865.

In *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), the Court applied the *Chevron* standard in determining the deference to be accorded regulations relating to the Customs classification of certain imported goods, analogizing Customs regulations to tax regulations. The Court found that—in light of the Customs Service's use of the notice-and-comment rulemaking process—the regulations at issue were entitled to *Chevron* deference. 526 U.S. at 394.

Rulings are not, however, the same as regulations. In its analysis of this case, the Federal Circuit looked to the deference to be accorded revenue rulings issued by the Internal Revenue Service, noting that the parallels between IRS and Customs rulings convinced it that "the latter, like the former, do not require *Chevron* deference." The Federal Circuit's

analysis of the deference owed to Customs and IRS interpretative rulings is correct.

3. Under *Chevron* and *Haggar*, not all agency rulemaking is entitled to deference. Only four months ago, the Court properly declined to extend such deference to an opinion letter issued by the U.S. Department of Labor. *See Christensen*, 120 S. Ct. at 1662-63. The Court explained that the interpretation at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" and thus did not warrant *Chevron* deference. *Id.* at 1662.

Like the opinion letter at issue in *Christensen*, Customs classification rulings (such as the one at issue here) and IRS revenue rulings are not subject to notice and comment and are not published in either the Federal Register or the *Code of Federal Regulations*. These safeguards are required by the Administrative Procedure Act (APA) to afford an opportunity for interested persons to comment on agency interpretations before they become final. 5 U.S.C. § 553 (1994). Public participation in an agency's rulemaking process is important for two reasons. First, the combined expertise of the agency and the public produces better rules, and second, the procedure enables interested parties to express their views to agency officials who are not directly accountable to the voters.

Amicus TEI submits that the discipline and openness engendered by the notice-and-comment procedure deter casual or arbitrary action, forestall confusion, and ultimately produce more effective regulations, all to the benefit of the government and the public. This same process is not normally followed with interpretative rules such as Customs classification rulings and IRS revenue rulings, and accordingly a higher quantum of judicial scrutiny is appropriate to counterbalance the absence of notice and comment.

A Customs Service (or IRS) ruling should not be treated as a policy decision that courts must accept if it is minimally ra-

tional. To do so would permit and perhaps even encourage agencies to circumvent the intent of Congress because it is more expedient to create rules without public scrutiny. Equally troublesome, according *Chevron* deference to interpretative rulings may encourage the agencies to issue rulings to improve the likelihood of success in litigation.

Regulations and interpretative rulings are not the same. In the case of regulations, *Chevron* deference may be sensible because the public has participated in the rulemaking process. In contrast, in respect of interpretative rulings, judicial scrutiny must serve as a counterbalance to the lack of public participation in the process. Thus, the Federal Circuit correctly determined that *Chevron* deference should not be extended to standard Customs Service rulings.

4. What is the correct standard to be applied to Customs classification rulings? Following this Court's lead in *Haggar*, the Federal Circuit looked to the standard utilized in analyzing IRS revenue rulings. The appeals court found that Customs classification rulings, like IRS revenue rulings, were not entitled to deference. Its reasoning should be sustained.

Although an official interpretation of the IRS, revenue rulings are limited to the facts under consideration and are not published in the *Federal Register* or the *Code of Federal Regulations*. Most recently, in *Commissioner v. Schleier*, 515 U.S. 323 (1995), the Court wisely noted that the IRS's rulings do not have the force and effect of regulations, and "may not be used to overturn the plain language of a statute." *Id.* at 336 n.8.

IRS revenue rulings are mere litigating positions and not entitled to any deference. This is not merely the view of *amicus* TEI, but, more important, it is the view adopted by the United States Tax Court, a court uniquely qualified to assess the efficacy of IRS pronouncements. According to the Tax Court, a revenue ruling represents the Commissioner's position with respect to a specific factual situation and is merely the opinion of a lawyer in the agency. Thus, rulings are not binding on the courts and are only as persuasive as the IRS's reasoning and the precedents upon which the agency relies.

The Tax Court's position is consistent with this Court's holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), that deference to "an agency's convenient litigating position" is "entirely inappropriate." *Id.* at 213. *Amicus* TEI submits that, given the similarity between IRS revenue rulings and Customs classification rulings, the Federal Circuit correctly held that neither should be accorded any deference.

5. Alternatively, if the Court concludes that an intermediate level of deference should be accorded Customs rulings, the proper standard may be found in this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *i.e.*, "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Applying *Skidmore* here would place the burden of persuasion on the agency to convince the court of the meaning of the relevant statute. It would also encourage agencies to issue clear regulations, while acknowledging that an agency may have superior insights into regulatory meaning.

This case provides an opportunity for the Court to clarify the standard for reviewing agency interpretations. *Amicus* TEI respectfully submits that the courts according *Chevron* deference to such rules have inappropriately distended the doctrine. Applying *Skidmore* to interpretative rules such as those involved here will provide needed guidance to the lower courts and reserve *Chevron* deference, at most, to substantive rules subject to the notice-and-comment process.

Like the opinion letter in *Christensen*, agency interpretations contained in Customs classification and IRS revenue rulings should be "entitled to respect," but only to the extent

that those interpretations have the "power to persuade." The Federal Circuit found the Customs classification ruling in this case unpersuasive. Its opinion should be affirmed.

ARGUMENT

I.

Customs duties are imposed on imported goods in accordance with the Harmonized Tariff Schedules of the United States (HTSUS), 19 U.S.C. § 1202 (Supp. IV 1998). This case involves whether five categories of Respondent Mead Corporation's loose-leaf day planners (sometimes called "Filofaxes") should be assessed as a "bound diary" under subheading 4820.10.20 of the HTSUS or comes under the "other" provision of subheading 4820.10.40. The outcome—which will cause the tariff to be either zero or up to four percent—turns on the deference accorded rulings of the U.S. Customs Service under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In an interpretative ruling dated January 11, 1993, the Customs Service classified Mead's day planners as bound diaries subject to a four-percent tariff. Headquarters Ruling 955937, 1994 WL 712863 (Customs), *reprinted at* App. 28a-47a.[2] Mead sought review in the Court of International Trade, which affirmed the Customs Service's classification. (App. 19a-27a.) The United States Court of Appeals for the Federal Circuit reversed, holding that the day planners were neither "diaries" nor "bound" under common and commercial definitions of the terms. (App. 1a-16a.) Applying the standard set forth in *Chevron*, as recently interpreted by this Court in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999),

[2] References to "App." are to the appendix filed with the United States' Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

the Federal Circuit found that the Customs Service ruling issued to Mead was not entitled to deference. (App. 6a-7a.) This Court subsequently granted the government's petition for a writ of certiorari to consider two issues:

- Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods, and
- Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks, and address books, bound" in subheading 4820.10.20 of the HTSUS to include the spiral-ring and ring-bound day planners imported by Mead.

Amicus TEI's interest is with the first issue, for the question of the courts' deference to agency pronouncements lies at the heart of administrative law. The issue requires a careful balance, and the answer properly depends on the extent of public involvement in the development of the agency rule. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). To be sure, agencies develop expertise in the subject matters within their jurisdiction, but the public has a vital role to play in ensuring that an agency is well informed and its positions do not overreach. The importance of the notice-and-comment process in aiding an agency's efforts to administer a statute in a reasonable manner and preventing arbitrary actions cannot be overstated. Simply stated, without notice and comment, an agency's decision could be capricious. Without meaningful judicial review of interpretative rules, agencies could arrogate to themselves the power to unreasonably interpret or apply the law. Thus, a careful balance must be struck, and the courts are properly wary of deferring too much to agency interpretative rulings. *Amicus* TEI submits that the Federal Circuit struck the proper balance. Its decision on the deference to be granted to the Customs Service's classifica-

tion ruling fully accords with this Court's decisions in *Chevron* and subsequent cases and should be affirmed.

II.

Chevron has been called "one of the most important decisions in the history of administrative law." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994) (hereinafter cited as "DAVIS & PIERCE"). In that case, the Court considered the Environmental Protection Agency's construction of the Clean Air Act and set forth the following standard of review:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-83 (footnote omitted). The Court noted that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. Because the Court viewed the regulatory scheme in *Chevron* to be a "reasonable accommodation of manifestly competing interests," it held that the agency's interpretation was entitled to deference. *Id.* at 865.

Subsequently, in *Haggar*, the Court applied this standard in determining the deference to be accorded regulations relating to the Customs classification of certain imported goods,

analogizing Customs regulations to tax regulations. 526 U.S. at 394 (citing *Atlantic Mutual Insurance Co. v. Commissioner*, 523 U.S. 382, 389 (1998) (when a term in the Internal Revenue Code is ambiguous, "the task that confronts us is to decide, not whether the Treasury *regulation* represents the best interpretation of the statute, but whether it represents a reasonable one." (emphasis added)). The Court then found that—in light of the Customs Service's use of the notice-and-comment rulemaking process—the regulations at issue were entitled to *Chevron* deference. 526 U.S. at 394.

The *Chevron* and *Haggar* decisions, however, do not mean that all agency rulemaking is entitled to deference. Indeed, not according deference to the Customs ruling here at issue is wholly consistent with those decisions. The Federal Circuit explained that, unlike the regulations at issue in *Haggar*, ordinary classification rulings do not have the force of law and are not issued with procedural safeguards such as public notice and comment. (App. 6a-7a.) The court held that the Customs Service's classification ruling did not warrant the deference owed to regulations that "fill[] a gap or define[] a term" of an ambiguous HTSUS provision. (App. 5a.) In reaching this conclusion, the court relied heavily on the deference standard applied to revenue rulings issued by the Internal Revenue Service (IRS). Citing *Commissioner v. Schleier*, 515 U.S. 323 (1995), the court noted that IRS rulings do "not have the force and effect of regulations." It concluded that "the parallels between IRS Revenue Rulings and Customs rulings further convince this court that the latter, like the former, do not require *Chevron* deference." (App. 8a.) The Federal Circuit's analysis of the deference owed to Customs and IRS interpretative rulings is correct.

III.

Not all agency interpretations are entitled to *Chevron* deference. Only four months ago, the Court properly declined to

extend such deference to an opinion letter issued by the U.S. Department of Labor. In *Christensen*, the Court noted that the interpretation at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." 120 S. Ct. at 1662-63. Labor Department opinion letters—like interpretations set forth in policy statements, agency manuals and enforcement guidelines, all of which lack the force of law—thus do not warrant *Chevron* deference. *Id.* at 1662 (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995) and other cases).

Like the opinion letter at issue in *Christensen*, Customs classification rulings (such as the one at issue here) and IRS revenue rulings are not subject to notice and comment and are not published in either the *Federal Register* or the *Code of Federal Regulations*. As such, they are an agency interpretation that should not be given "the force and effect of regulations." *Cf. Schleier*, 515 U.S. at 336 n.8 (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990)).[3]

As the Federal Circuit recognized below (App. 5a-6a), the Administrative Procedure Act (APA) generally requires publication of a notice of proposed rulemaking, an opportunity for interested persons to comment, and a hearing before the adoption of "legislative" regulations, *i.e.*, regulations specifically authorized by statute. 5 U.S.C. § 553 (1994). The legislative history confirms what is apparent from the face of the statute: Section 553's principal purpose is "to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice." H.R. REP. NO. 1980, 79th Cong., 2d Sess. 23 (1946). To ensure the effectiveness of those safeguards, "notice must

[3] Moreover, the IRS does not claim for revenue rulings the force and effect of Treasury Department regulations. Rev. Proc. 89-14, § 7.01(4), 1989-1 C.B. 814, 815 ("Revenue rulings published in the [Internal Revenue] Bulletin do not have the force and effect of Treasury Department regulations (including Treasury Decisions) . . .").

be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto." S. REP. NO. 752, 79th Cong., 1st Sess. 14 (1945). An exception is provided from the notice-and comment requirements, however, for agency interpretative rules. 5 U.S.C. § 553(b)(3)(A) (1994).

Public participation in an agency's rulemaking process is important for two reasons. First, the combined expertise of the agency and the public produces better rules since public input leaves the agency better informed and may offset any institutional bias for or against a particular rule. Second, the procedure guarantees an open process by enabling interested parties to express their views to agency officials who are not directly accountable to the voters. Thus, opportunities for closed-door or back-room deals can be minimized. *See generally* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1086 (1995) (hereinafter cited as "Galler").

Organizations such as *amicus* TEI frequently comment on proposed regulations and its members' experience and expertise are often sought by the Treasury Department and IRS, particularly in administrative matters involving large corporations. *Amicus* TEI submits that the discipline and openness engendered by the notice-and-comment procedure deter casual or arbitrary action, forestall confusion, and ultimately produce more effective regulations, all to the benefit of the government and the public alike.

For example, the IRS and Treasury Department recently issued proposed regulations under section 411(d)(6) of the Internal Revenue Code (26 U.S.C.), relating to the technical requirements for qualified retirement plans. Comments submitted by *amicus* TEI and others to the IRS in response to an earlier notice were reflected in the proposed rulemaking and additional assistance was requested on several outstanding issues. *See Notice of Proposed Rulemaking and Notice of Pub-*

lic Hearing: Special Rules Regarding Optional Forms of Benefit under Qualified Retirement Plans, 65 Fed. Reg. 16546 (March 29, 2000), *reprinted in* 2000-16 I.R.B. 903 (April 17, 2000). Although the IRS and Treasury Department are still reviewing comments on the proposed regulations, *amicus* TEI predicts that the final regulations will be better reasoned—and the public will be better served—as a result of the notice-and-comment process.

This same process is not normally followed with interpretative rules such as Customs classification rulings and IRS revenue rulings,[4] and a higher quantum of judicial scrutiny is appropriate to counterbalance the absence of notice and comment. "It would be contrary to the intent of the APA (and thus of Congress) to permit an agency to do by interpretive rule what Congress intended it to do by legislative rulemaking. For the court to then defer to the 'agency's answer' where that answer is an interpretive rule would be not only contrary to congressional intent but also a neglect of judicial duty in reviewing agency determinations under 5 U.S.C. section 702." *Johnson City Medical Center v. United States*, 999 F.2d 973, 979-80 (6th Cir. 1993) (Batchelder, J., dissenting) (footnote omitted). Allowing public comment before a ruling is issued keeps the agency open-minded and flexible. *See National Tour Brokers Association v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination." (footnote omitted)).

A Customs Service (or IRS) ruling should not be treated as a policy decision that courts must accept if it is minimally rational. To do so would permit and perhaps even encourage agencies to circumvent the intent of Congress because it is

[4] Although not required to do so by the APA, the Treasury Department normally follows the APA notice-and-comment procedures in respect of interpretative tax regulations. MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[3] (2d ed. 1991).

more expedient to create rules without public scrutiny. It would also facilitate the issuance of vague or one-sided regulations, which the agency could later interpret to its own end. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication, rather than through the more cumbersome rulemaking process."); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 174 (3d Cir. 1999) ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' " (citation omitted)).

Equally troublesome, according *Chevron* deference to interpretative rulings may encourage agencies such as the Customs Service and the IRS to issue rulings to improve the likelihood of success in litigation. *See, e.g., Stubbs, Overbeck & Associates, Inc. v. United States*, 445 F.2d 1142, 1147 (5th Cir. 1971) (refusing to follow a revenue ruling because it was not a reasonable interpretation of the statute and appeared as if the "drafter of the Ruling did a bit of legislating for the convenience of the IRS"); *Tandy Corp. v. Commissioner*, 92 T.C. 1165, 1170 (1989) (refusing to follow a revenue ruling because it represented "a thinly veiled attempt to influence this litigation, judging from the similarity of the facts and the timing of its issuance"). The Tax Court and other courts have routinely looked upon "bootstrapping revenue rulings" with disfavor. *Id.; Ludwig v. Commissioner*, 68 T.C. 979, 986 n.4 (1977). *See also Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 279-81 (1966); *Busse v. Commissioner*, 419 F.2d 1147, 1152 n.12 (7th Cir. 1973).

If the Court extends the *Chevron* deference standard to administrative rulings such as those issued by the Customs Service or the IRS, it will imbue those pronouncements with

the same status as regulations. Although the government attempts to blur the distinction between legislative regulations and interpretative rulings,[5] they are not the same. In the case of regulations, *Chevron* deference may be salutary because the public has participated in the rulemaking process. It makes no sense, however, in respect of interpretative rulings. Judicial scrutiny must counterbalance the lack of public participation in the process. Thus, the Federal Circuit's determination that *Chevron* deference should not be extended to standard Customs Service rulings is correct.[6]

IV.

What *is* the correct quantum of deference for Customs classification rulings? Following this Court's lead in *Haggar*—which noted the similarity of trade and tax issues—the Federal Circuit looked to the standard utilized in analyzing IRS revenue rulings. (App. 7a-8a.) After reviewing the applicable Treasury Regulations and case law, the appeals court found that Customs classification rulings, like IRS revenue rulings, were not entitled to deference. The Federal Circuit's analysis of IRS revenue rulings is well founded[7] and should

[5] Brief for the Petitioner United States, *United States v. Mead Corp.* (No. 19-1434) at 19-20.

[6] This is not to say that Customs classification and IRS revenue rulings have no value. The rulings give the public notice of agency positions and promote consistency. These attributes, however, do not mean that the rulings should be granted the same status as regulations where public comment has been sought before issuance. *See* Galler at 1045-46.

[7] The proper standard of deference to be accorded revenue rulings has led to confusion, with courts adopting divergent standards. *See, e.g., Estate of Kosow v. Commissioner*, 45 F.3d 1524, 1528 n.4 (11th Cir. 1995) (holding that revenue rulings are merely an opinion of an IRS attorney); *Johnson City Medical Center*, 999 F.2d at 976 (finding "some deference"); *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994) (granting "great deference"); *First Chicago NBD Corp. v. Commissioner*, 135 F.3d. 457, 459 (7th Cir. 1998) (granting "some weight"). One commentator has suggested that generalist judges may be more willing to accept IRS revenue rulings "simply because they prefer to leave tax cases alone." Galler at 1077.

serve as the standard for analyzing Customs classification rulings.

Revenue rulings are issued under the general grant of authority set forth in section 7805(a) of the Internal Revenue Code (26 U.S.C.), which gives the Treasury Department authority to prescribe "all needful rules and regulations." Although a ruling is an official interpretation of the IRS, the vast majority are adopted without public comment. 26 C.F.R. § 601.601(d)(2)(*b*)(v)(*f*) (2000) (comments may be solicited, but only if justified by "special circumstances"). Rulings are limited to the facts under consideration and may be changed by subsequent legislation, regulations, court decisions, or even other rulings. 26 C.F.R. §§ 601.601(d)(2)(*b*)(v)(*a*), (*e*) (2000). They are not published in the *Federal Register* or the *Code of Federal Regulations*. *See* 26 C.F.R. § 601.601(d)(1) (2000).[8]

This Court has not definitively ruled on the deference to be accorded modern IRS revenue rulings, though in early cases they were found to be of "little aid" in interpreting the tax laws because they were not subject to Treasury Department review. *See, e.g., Biddle v. Commissioner*, 302 U.S. 573, 582 (1938) (citing *Helvering v. New York Trust Co.*, 292 U.S. 455, 468 (1934)). Most recently, in *Commissioner v. Schleier*, the Court considered a taxpayer argument that the liquidated damages received under an Age Discrimination in Employment Act claim should be excluded from gross income as "damages received . . . on account of personal injuries or sickness" under section 104(a)(2) of the Internal Revenue Code (26 U.S.C.). 515 U.S. at 327. The taxpayer

[8] The court below also noted that in some ways Customs classification rulings are a less formal interpretation than revenue rulings because the latter are issued by the IRS's National Office, while the former may also be issued by a port office. (App. 7a-8a.)

claimed that under a Treasury Regulation the damages were amounts received based upon "torts or tort type rights" and therefore non-taxable. In support of her position, the taxpayer cited a revenue ruling. Recognizing that the ruling seemed to rely upon the same reading urged by the taxpayer, this Court stated that the IRS's " 'interpretive rulings do not have the force and effect of regulations,' and they may not be used to overturn the plain language of a statute." *Id.* at 336 n.8 (citing *Davis v. United States*, 495 U.S. 472, 484 (1990)).[9] *See also Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 162 n.3 (1993) (deferring the question of the deference to be accorded revenue rulings "to another day"); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.9 (1992) ("Even if they were entitled to deference, neither of the [revenue] rulings . . . goes to the narrow question presented here.").

IRS revenue rulings are mere litigating positions and are not entitled to any deference. This is not merely the view of *amicus* TEI, whose members frequently find themselves at odds with the IRS. It is, more important, the view adopted by the United States Tax Court, a court uniquely qualified to assess the efficacy of IRS pronouncements. *United States v. Allen-Bradley Co.*, 352 U.S. 306, 311 (1957) (Harlan, J., concurring) (Tax Court holds "special expertise in tax matters"). According to the Tax Court, "a revenue ruling merely represents the Commissioner's position with respect to a specific factual situation." *Stark v. Commissioner*, 86 T.C. 243, 250-51 (1986). They are "merely the opinion of a lawyer in the agency and must be accepted as such" and are "not binding

[9] In *Davis*, the Court suggested that revenue rulings were entitled to "considerable weight" where they involve the contemporaneous construction of a statute, have been in long use, and have survived reenactment of the statute they construe. 495 U.S. at 484. The Court did not, however, cite *Chevron*, thereby intimating that a high level of deference is not warranted. Moreover, many revenue rulings do not meet the conditions set forth in *Davis*.

on the . . . courts." *Northern Indiana Public Service Co. v. Commissioner*, 105 T.C. 341, 350 (1995), *aff'd*, 115 F. 3d 506 (7th Cir. 1997) (citing *Stubbs, Overbeck & Associates, Inc.*, 445 F.2d at 1146-47). Hence, "a ruling or other interpretation by the Commissioner is only as persuasive as her reasoning and the precedents upon which she relies." *Halliburton Co. v. Commissioner*, 100 T.C. 216, 232 (1993), *aff'd without published opinion*, 25 F.3d 1043 (5th Cir. 1994). *See also DePaolis v. Commissioner*, 69 T.C. 283, 292 (1977) (Hall, J., dissenting) ("[t]o treat a ruling as more than the position of one of the litigants before us is to permit a man to be judge in *his* own cause—a principle abhorrent to law since the days of Hammurabi"). The Tax Court's position is consistent with this Court's holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), that deference to "an agency's convenient litigating position" is "entirely inappropriate." *Id.* at 213. *Amicus* TEI submits that, given the similarity between IRS revenue rulings and Customs classification rulings, the Federal Circuit correctly held that neither should be accorded any deference.[10]

[10] In its brief on the merits, the United States relies heavily on *United States v. Correll*, 389 U.S. 299 (1967), for the proposition that the Federal Circuit erred in suggesting that deference may not be owed to revenue rulings. Brief for the Petitioner United States, *United States v. Mead Corp.* (No. 99-1434) at 16, 24-27, 31, 38. The government's citation of *Correll* is incorrect, disingenuous, and unpersuasive. That case involved the deference to be granted interpretative *regulations* that had been issued as a Treasury Decision (and subject to notice and comment), not a revenue ruling. *See Correll v. United States*, 369 F.2d 87, 89 n.2 (6th Cir. 1966). To be sure, the Court noted in passing that the IRS Commissioner's position in the case was first announced in a revenue ruling, 389 U.S. at 302 n.10, but the decision is inapposite to the question at issue here. *See* Rev. Proc. 89-14, *supra* n.3 (IRS admitting revenue rulings do not have same force of law as Treasury Decisions). Thus, the Federal Circuit's discussion of the deference owed to revenue rulings is consistent with this Court's decision in *Correll*. *See* note 12 *infra*, for a discussion of the deference to be accorded interpretative tax regulations.

V.

Alternatively, if the Court concludes that an intermediate level of deference should be accorded Customs rulings, the proper standard may be found in this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In that case, the Court held:

> We consider that the rulings, interpretations and opinions of the Administrator under this [Fair Labor Standards] Act, *while not controlling upon the courts* by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Id. at 140 (emphasis added). Under *Skidmore*, the weight to be given the interpretation depends upon a variety of factors, including the ruling's thoroughness, the validity of its reasoning, its consistency with earlier and later interpretations, and "all those factors which give it power to persuade, if lacking power to control." *Id.*[11]

Thus, the Court has held that, although not entitled to deference, informal interpretations are entitled to some respect or weight on judicial review. *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991). "A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position." *Id.* Applying *Skidmore* here would place the burden of persuasion on the agency to convince a court that its interpretation of the statute is correct.

[11] Although *Skidmore* was decided 40 years before *Chevron*, its reasoning is not vitiated by the Court's decision. Only four months ago, this Court cited *Skidmore* in holding that Department of Labor opinion letters were not entitled to *Chevron*'s higher standard of deference. *Christensen*, 120 S. Ct. at 1663. *See also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-57 (1991) (citing *Skidmore* in holding that interpretative guidelines are not entitled to *Chevron* deference).

It would also encourage agencies to issue clear regulations, while acknowledging that an agency may have superior insights into regulatory meaning. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 687-88 (1996).

That a need exists for this Court to clarify the interaction of *Skidmore* and *Chevron* is demonstrated by the lower courts' confusion about the deference to be accorded agency interpretations such as Customs classification rulings and IRS revenue rulings. Some courts have held that revenue rulings are entitled to *Chevron* deference while others have limited the weight given to interpretative rulings.[12] This case provides an opportunity for the Court to clarify the standard. *Amicus* TEI respectfully submits that the courts according *Chevron* deference to such rules have inappropriately distended the doctrine, as most recently delineated in *Christensen*. *See* DAVIS & PIERCE § 3.5, at 119 (*Chevron* "should not be held to apply to agency pronouncements in less formal formats, *e.g.*, manuals, letters, guidelines, interpretative rules, or litigating positions."). "[D]eference is not abdication." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Similarly, "deference cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Elizabeth Blackwell Health Center for Women v.*

[12] *Compare Trans Union Corp. v. Federal Trade Commission*, 81 F.3d 228, 230 (D.C. Cir. 1996) ("[W]e have extended *Chevron* deference to agency interpretive rules"); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (equal deference); and *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 557 (6th Cir. 1995) (same); *with Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 441 (7th Cir. 1994) (en banc), *aff'd on other grounds*, 516 U.S. 152 (1996) (concluding that interpretative rules are "undeserving of substantial deference under *Chevron*"). *See generally* DAVIS & PIERCE § 3.5 (*Chevron* should not apply to informal pronouncements and interpretative rules).

Knoll, 61 F.3d 170, 185 (3d Cir. 1995), (Nygaard, J., dissenting) (citations and internal quotation marks omitted).

The Court's half-century old decision in *Skidmore* provides the guidepost that the lower courts need. Applying *Skidmore* to interpretative rules such as those involved here will provide needed guidance to the lower courts, while reserving *Chevron* deference, at most, to rules subject to the notice-and-comment process. It will avoid absurdities such as the Third Circuit's opinion in *Connecticut General Life Insurance Co. v. Commissioner*, 177 F.3d 136, *cert. denied*, 120 S. Ct. 469 (1999), where the court deferred to an IRS interpretation of a regulation that was advanced for the first time in litigation.[13] Such bootstrapping pronouncements are "particularly unreliable evidence of an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients' interest and the uneven level of supervision of work product of agency lawyers." DAVIS & PIERCE § 3.5, at 120.

Like the opinion letter in *Christensen*, agency interpretations contained in Customs classification and IRS revenue rulings may be "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *Christensen*, 120 S. Ct. at 1663 (citation omitted). The Federal Circuit found the Customs classification ruling in this case unpersuasive. Its opinion should be affirmed.

[13] Even in *Connecticut General*, the regulation at issue was "legislative" (or substantive), rather than interpretative, and thus entitled to great deference. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.8, at 181-82 (3d ed. 1991). Even legislative regulations—those promulgated under a specific legislative grant of authority—must represent a reasonable interpretation of the statute. *Chevron*, 467 U.S. at 865. In contrast, interpretative regulations are entitled to less deference. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981)). They may have "particular force" if they are a substantially contemporaneous construction of the statute, longstanding, consistently applied, and scrutinized by Congress during subsequent re-enactments of the statute. *National Muffler Dealers Association v. United States*, 440 U.S. 472, 477 (1979). None of these conditions is satisfied here.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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